

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SHERETTA Y. MYERS**

Claimant

VS.

**FOUR B CORPORATION d/b/a PRICE CHOPPER**

Self-Insured Respondent

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Docket No. 1,043,611

**ORDER**

Respondent appealed the April 9, 2009, Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts.

**ISSUES**

Claimant requested a preliminary hearing pursuant to K.S.A. 44-534a to seek medical treatment for an injury she allegedly sustained working for respondent. Claimant alleges she developed pain in her neck and left shoulder on approximately December 11 or 12, 2008, while stocking produce at one of respondent's supermarkets. In the April 9, 2009, Preliminary Decision, Judge Roberts determined claimant provided respondent with timely notice of her claimed injury. More importantly, the Judge ordered an evaluation by Dr. Vito Carabetta so the doctor could address the issue of whether claimant's work either aggravated or accelerated her neck and shoulder condition.

Respondent contends Judge Roberts erred. Presuming the Judge ordered respondent to provide authorized medical care and treatment with Dr. Carabetta,<sup>1</sup> respondent argues claimant failed to prove her alleged injury arose out of and in the course of her employment with respondent or that it occurred on either December 11 or 12, 2008. Next, respondent contends the Judge erred by finding claimant provided respondent with timely notice of her injury. Consequently, respondent requests the Board to reverse the Preliminary Decision entered by Judge Roberts.

Claimant, however, maintains the Judge ordered an independent medical evaluation under K.S.A. 44-516 and, therefore, this appeal should be dismissed as the order is

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<sup>1</sup> Respondent's Brief at 2 (filed May 4, 2009).

interlocutory in nature. Claimant argues the Board lacks jurisdiction to review the Preliminary Decision.

The only issues before the Board on this appeal are:

1. Did the Judge grant claimant medical benefits or, instead, order an independent medical examination?
2. Does the Board have jurisdiction to review the Preliminary Decision entered by the Judge?
3. If so, did claimant establish that she sustained personal injury by accident arising out of and in the course of employment with respondent and that she provided respondent with timely notice of her alleged accidental injury?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned Board Member finds and concludes that this appeal should be dismissed.

One of the issues before Judge Roberts at the April 9, 2009, preliminary hearing was whether claimant sustained personal injury by accident arising out of and in the course of her employment with respondent. The Judge did not enter a finding on that issue. Instead, the Judge ordered that Dr. Vito Carabetta was to examine and evaluate claimant for purposes of determining whether claimant's alleged work activities either aggravated or accelerated any injury or condition in claimant's neck or left shoulder. Judge Roberts wrote, in part:

Although Claimant did relate pain in her neck/left shoulder to her personal physician while off work for an unrelated illness, her work activities stocking produce could have aggravated or accelerated this condition resulting in her request for medical treatment from her employer on December 23, 2008. The court finds that an examination with Dr. Vito Carabetta to address this issue is appropriate. Respondent's attorney is ordered to schedule such examination at the doctor's earliest convenience and prepare a letter to Dr. Carabetta with medical records attached and forward to Claimant's attorney for signature/approval. Claimant's attorney may supplement the medical records if needed. The parties are ordered to refrain from any further contact with Dr. Carabetta. Dr. Carabetta is directed to forward his report to the court with copies to the parties. The costs of said examination will be assessed against Respondent.<sup>2</sup>

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<sup>2</sup> ALJ Preliminary Decision (Apr. 9, 2009) at 2.

That is not an award of medical benefits. Rather, it is an order for an independent medical evaluation (IME) to address the cause of claimant's neck and left shoulder symptoms. The Workers Compensation Act grants the Division of Workers Compensation the power and authority to order such evaluations. K.S.A. 44-516 reads:

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

Accordingly, the Judge did not exceed her jurisdiction in appointing Dr. Carabetta to examine claimant and render an opinion regarding the cause of claimant's neck and shoulder symptoms.

An order for an IME under K.S.A. 44-516 is not a finding of compensability. The ordered examination is not medical treatment. Thus, it is neither a preliminary award of benefits entered under the preliminary hearing statute, nor is it a final award. The Board has previously held that an order for an IME is an interlocutory order.<sup>3</sup> K.S.A. 2008 Supp. 44-551(i)(1) limits the Board's jurisdiction to review of "final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge . . . ." The Board concludes the Preliminary Decision entered by Judge Roberts is interlocutory in nature.

In general, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. However, the Board has recognized an exception to this general rule.<sup>4</sup> In *Skahan*,<sup>5</sup> the Kansas Court of Appeals set out three criteria whereby an order may be final even if it does not resolve all issues between the parties. The order may be final if it (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment.

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<sup>3</sup> See, e.g., *Scott v. Total Interiors*, No. 244,761, 2000 WL 1134444 (Kan. WCAB July 28, 2000); *Kitchen v. Luce Press Clippings, Inc.*, No. 228,213, 1999 WL 288895 (Kan. WCAB Apr. 2, 1999).

<sup>4</sup> *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (Kan. WCAB Oct. 12, 1999).

<sup>5</sup> *Skahan v. Powell*, 8 Kan. App. 2d 204, 206, 653 P.2d 1192 (1982); *Scales v. Shawnee Gardens Nursing Center*, No. 1,021,953 and *Scales v. Presbyterian Manors, Inc.*, No. 1,021,954, 2005 WL 3030764 (Kan. WCAB Oct. 11, 2005).

An order referring a claimant for an IME does not satisfy those three criteria, however, as the order does not conclusively determine the disputed question of whether claimant suffered personal injury by accident that arose out of and in the course of her employment with respondent. That remains an issue for the Judge to determine once Dr. Carabetta's evaluation report is received. Indeed, it may remain an issue when the claim is ultimately submitted to the Judge for a final determination.

The Board is cognizant that Judge Roberts made a finding regarding timely notice in the Preliminary Decision. Respondent may reserve that issue for a future appeal should the Judge receive the evaluation report from Dr. Carabetta and, as a consequence, grant claimant preliminary hearing benefits. Accordingly, the appeals process is not bifurcated and there is judicial economy. In addition, the information provided by Dr. Carabetta may be pertinent to the accident, which, in turn, may affect the notice issue.

**WHEREFORE**, it is the finding, decision and order of the Board that this appeal of the April 9, 2009, Preliminary Decision entered by Judge Marcia L. Yates Roberts is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Leah B. Burkhead, Attorney for Claimant  
Timothy G. Lutz, Attorney for Respondent  
Marcia L. Yates Roberts, Administrative Law Judge